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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EPIFANIO LOPEZ ROJAS, Defendant and Appellant.	E053564 (Super. Ct. No. INF064040) O P I N I O N

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant Epifanio Lopez Rojas was charged with one count of oral copulation of a child of 10 years of age or younger (count 1; Pen. Code, § 288.7, subd. (b)), and two counts of lewd and lascivious acts against a child under the age of 14 (counts 2 & 3; Pen. Code, § 288, subd. (a)). Certain enhancement allegations were also alleged. (Pen. Code, §§ 1203.066, subd. (a)(8), 667.61, subd. (e)(5).)

Defendant understands Spanish only. During a postarrest interrogation, a detective informed him of his *Miranda*[1] rights in Spanish. Regarding the right to have counsel appointed for him if he could not afford an attorney, the detective used a colloquial Spanish word for the English word "appoint," which can also mean to put down, or jot down. Defendant agreed to talk to the detective without an attorney present.

During the interrogation, defendant made incriminating statements concerning his conduct toward one of the child victims. The detective told defendant that, when he was a traffic officer, he had a practice of being more lenient to individuals who were honest with him. Thereafter, defendant made additional admissions concerning the second victim.

During defendant's trial, over defense objections, the prosecution showed videotape recordings of Riverside Child Assessment Team (RCAT) interviews of the two victims in their entirety to the jury.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

The jury convicted defendant of the charged offenses and found true the sentence enhancement allegations. The trial court sentenced defendant to a determinate term of six years and an indeterminate term of 15 years to life.

On appeal, defendant raises five issues; three arise from his postarrest interrogation, and two relate to the admission of the RCAT interviews. Defendant argues that the trial court erred in refusing to suppress evidence of statements defendant made to the interrogating detective because (1) the detective failed to advise defendant of his right to have counsel present before police questioning, (2) the detective's use of colloquial language in describing the right to appointment of counsel rendered the admonition too ambiguous, and (3) defendant contends the interrogating detective's comment about treating honest traffic violators with leniency rendered his statements involuntary.

Regarding the RCAT interviews, defendant argues the trial court abused its discretion by admitting the videotapes of the interviews under Evidence Code sections 1360 and 352.[2]

We conclude the trial court did not err in admitting defendant's statements following the *Miranda* admonishment. We further conclude there was no prejudicial error in admitting the videotapes of the RCAT interviews. Accordingly, defendant's conviction is affirmed.

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[2] All further statutory references are to the Evidence Code unless otherwise indicated.

II. FACTUAL BACKGROUND

On the morning of November 7, 2008, defendant was at his residence in Thermal. Defendant resided with his long-term girlfriend, Guadalupe G. (Guadalupe), Guadalupe's brother, Jorge G. (Jorge), Jorge's wife, Maria Christina (Maria), and Jorge and Maria's two daughters, A. and Ang.[3] A. was six years old at that time.

At approximately 5:45 a.m., Jorge took Maria to work, leaving A. at the residence with Guadalupe and defendant. Guadalupe was sleeping in the bedroom; A. was in the living room. Defendant asked A. if she wanted to watch cartoons.

At approximately 6:50 a.m., Jorge returned to the residence. Jorge parked his car on the street and entered the double-wide trailer. Upon entering, Jorge immediately saw defendant with A. on the living room floor. A. was lying on her back, her arms placed underneath her to hold herself up. Defendant was fully clothed and on his knees, positioned in front of A. A.'s shorts and underwear were pulled down to her knees. According to A., while she and defendant were lying on the floor, defendant licked her "little thing," referring to her vagina. Jorge saw defendant's hand in the general vicinity of A.'s vagina, but was unable to see defendant specifically touch A.

Jorge asked defendant what was happening. Defendant replied: "'Don't think what you think it is. It's not what you think it is . . . .'" Jorge took A. to a separate room and asked her specific questions regarding where defendant touched her. Initially, A. was

[3] For purposes of clarity, we refer to some of the individuals by their first names. In no way do we mean any disrespect by this action.

afraid because she believed she did something wrong. After Jorge assured A. that she was not in trouble, A. indicated defendant touched her vagina with his tongue. A. further explained that defendant gave her a dollar, which she was holding in her hand, to not tell anybody what occurred.[4] Jorge became angry and punched defendant a number of times before he called the police.

After notifying the police, Jorge telephoned his sister Clementina and told her what had occurred between A. and defendant. Clementina and her daughter, M., arrived at Jorge's residence before the police. M. was nine years old at the time. After M. heard people talking about what defendant had allegedly done to A., Clementina asked M. if defendant had touched her.

M. told her mother that on October 30, 2008, she went to sleep on the kitchen floor with defendant and Guadalupe. Guadalupe slept in between defendant and M. At one point in the evening, M. woke up to find defendant "in the corner where [she] was sleeping," unbuttoning and unzipping her pants. M. knew it was defendant because she opened her eyes briefly during the incident, however, when she felt her zipper go down she became scared and closed her eyes. While in bed, M. told Guadalupe that she "[felt] something," referring to her zipper. Guadalupe told M. "to not worry." Thereafter, M. did not tell anybody else because she was "scared" that no one would believe her.

[4] During cross-examination, Jorge testified that it was not uncommon for Guadalupe and defendant to give A. a $1 bill.

When the police arrived at Jorge's residence, defendant was arrested and transported to the Indio sheriff's station. Detective Juan Zamora interviewed defendant, where defendant made incriminating statements regarding the sexual assaults of A. and M.

Additional facts will be discussed below where pertinent to the issues raised in this appeal.

III. ANALYSIS

A. *Issues Arising from Detective Zamora's Miranda Warnings*

1. Factual and Procedural Background: Defendant's Motion to Suppress Evidence of Statements Made to Police

Prior to trial, defendant moved to suppress oral and written statements made to Detective Zamora based upon violations of his rights under *Miranda* and the Fifth Amendment to the United States Constitution. Defendant argued that Detective Zamora failed to advise him of his right to have counsel present prior to questioning, rendering the *Miranda* warning deficient. Further, defendant argued that because he was not advised of his right to counsel prior to questioning, the admonition that informed defendant of his right to appointed counsel free of charge was also deficient. The motion was based on the evidence presented at the hearing of the motion. The following is a summary of that evidence.

At approximately 3:00 p.m., Detective Zamora interviewed defendant at the Indio sheriff's station. Defendant informed Detective Zamora that he only understood Spanish.

Detective Zamora translated into Spanish the *Miranda* warnings that were written in English on a preprinted form. The interview was conducted in Spanish and recorded. The recording was translated and transcribed in English and Spanish for the prosecutor. With the exception of one phrase, which we discuss below, the accuracy of the following portion of the translation is not disputed.

"[Detective Zamora:] But before I talk to you. Uh I need to explain to you your rights. [¶] . . . [¶]

"[Defendant:] Uh-huh yes that's fine.

"[Detective] Zamora: Okay?

"[Defendant]: Uh-huh. [¶] . . . [¶]

"[Detective Zamora:] Uh this form has the rights in English. But I'm going to translate them for you.

"[Defendant]: Uh-huh. [¶] . . . [¶]

"[Detective Zamora:] To Spanish okay?

[Defendant]: Okay. [¶] . . . [¶]

"[Detective Zamora:] Very wel[l]. You have the right to remain silent. You understand? [¶] . . . [¶]

"[Defendant:] Yes. [¶] . . . [¶]

"[Detective Zamora:] Okay. Uh what you say will be can be used in a against uh against you. You understand? [¶] . . . [¶]

"[Defendant:] Yes I understand. [¶] . . . [¶]

"[Detective Zamora:] Okay. You have the right to have an attorney present and when I ask you questions. You understand? [¶] . . . [¶]

"[Defendant:] Yes I understand. [¶] . . . [¶]

"[Detective Zamora:] Okay. If you can't pay an attorney. One will be put down[5] for you. You understand? [¶] . . . [¶]

"[Defendant:] Uh-huh yes I understand. [¶] . . . [¶]

"[Detective Zamora:] Okay. You do understand.

"[Defendant]: Uh-huh. [¶] . . . [¶]

"[Detective Zamora:] Okay. Well the um uh it's what I want to talk to you about.

"[Defendant]: Uh-huh. [¶] . . . [¶]

"[Detective Zamora:] If it's alright with you.

"[Defendant]: Uh-huh. [¶] . . . [¶]

"[Detective Zamora:] Is that alright with you? [¶] . . . [¶]

"[Defendant:] That's fine yes."

Due to the alleged deficiencies in the *Miranda* warnings, defendant argued his oral and written statements to Detective Zamora were inadmissible. The trial court denied the motion, stating that "there was substantial compliance with . . . *Miranda*," defendant indicated he understood his rights, and "there didn't seem to be any problems as a result thereof."

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5 Detective Zamora used the Spanish word "apuntado" to explain to defendant his right to *appointed* counsel if he could not afford retained counsel. The word "apuntado" was translated as "put down" in the transcript.

2. The Applicable Legal Principles

In *Miranda*, the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination prevents the prosecution from using "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda, supra*, 384 U.S. at p. 444.) The court sought to protect suspects from the "inherently compelling pressures" of custodial interrogation. (*Id.* at p. 467.) The court envisioned that the procedural safeguards would allow a suspect to speak freely, if he so chooses, rather than feeling compelled to do so. (*Id.* at p. 469.)

To effectuate these procedural safeguards, a suspect in custody "must first be informed in clear and unequivocal terms that he has the right to remain silent" and "that anything said can and will be used against the individual in court." (*Miranda, supra,* 384 U.S. at pp. 467-469.) In addition, a suspect in custody must be advised of his "right to consult with a lawyer and to have the lawyer with him during interrogation." (*Id.* at p. 471.) Further, a suspect in custody must be told that "if he is indigent a lawyer will be appointed to represent him." (*Id.* at p. 473.) If a suspect in custody is not made aware of his rights, "no evidence obtained as a result of interrogation can be used against him." (*Id.* at p. 479, fn. omitted.)

In reviewing a trial court's ruling on a motion to suppress evidence based upon a *Miranda* violation, the court "accept[s] the trial court's resolution of disputed facts and

inferences, and its evaluation of credibility, if supported by substantial evidence." (*People v. Kelly* (1990) 51 Cal.3d 931, 947.) "Although [the reviewing] court must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statements were legally obtained [citation], [it] may '"give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.' [Citations.]" (*Ibid.*)

3. Failure to Explicitly Advise Defendant of His Right to Have Counsel Present Prior to Police Questioning

Defendant first contends the *Miranda* warnings were deficient because they did not advise him of his right to have counsel present before questioning. We disagree.

Defendant asserts that an adequate *Miranda* warning "must include that the defendant has the right to the presence of an attorney before the police beg[i]n their interrogation." This proposition is unfounded. The Supreme Court has made it clear that *Miranda* warnings need not be presented in a "precise formulation." (*California v. Prysock* (1981) 453 U.S. 355, 359.) Rather, the *Miranda* warnings must reasonably "'conve[y] to [a suspect] his rights as required by *Miranda*.'" (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203.)

In *People v. Valdivia* (1986) 180 Cal.App.3d 657, a police officer told the defendant: "'You have the right of attorney, to speak with an attorney and to have him present before any question; do you understand me?'" (*Id.* at p. 661.) During the trial, the defendant never expressed to the court that the *Miranda* warnings confused him.

(*People v. Valdivia, supra,* at p. 664.) The court held the *Miranda* warnings were not "necessarily defective for failure to specifically include an advisement of a right to an attorney during, as well as before questioning." (*People v. Valdivia, supra,* at p. 660, fn. omitted.) The court reasoned that "most people" would believe counsel would be provided before and during questioning. (*Id.* at p. 663.) The court noted that "[a]ny oral statement, no matter how clear, may be misunderstood," but concluded that the defendant's failure to express any signs of confusion indicated that he did in fact understand his rights under *Miranda*. (*People v. Valdivia, supra,* at p. 664.)

In *People v. Cruz* (2008) 44 Cal.4th 636, a detective told the defendant: "'You have a right to talk to a lawyer and have him present with you while you are being questioned.'" (*Id.* at p. 666.) The defendant responded that he "'more or less'" understood the detective's admonishment. (*Ibid.*) The detective admonished the defendant for a second time, and after each warning asked the defendant if he understood his rights. (*Ibid.*) The defendant acknowledged that he did understand each of his rights. (*Ibid.*) On appeal, the state Supreme Court held "that defendant's responses . . . reflect a knowing and intelligent understanding of those rights, and that defendant's willingness to answer questions after expressly affirming on the record his understanding of each of those rights constituted a valid implied waiver of them." (*Id.* at pp. 668-669.)

Here, Detective Zamora did not explicitly inform defendant of his right to have counsel present before and during questioning. Rather, Detective Zamora stated: "You have the right to have an attorney present and when I ask you questions. You

understand?" Defendant replied: "Yes I understand." We do not believe that "most people" would understand Detective Zamora's statement as expressing a right to an attorney during questioning only. (See *People v. Valdivia, supra,* 180 Cal.App.3d at p. 663.) Detective Zamora's recitation of the *Miranda* warnings was not perfect. However, like the detective in *Cruz,* Detective Zamora asked defendant numerous times if he understood his *Miranda* rights. Defendant, like the defendant in *Cruz,* explicitly told his interrogator he understood each of his rights. Defendant did not express any confusion as to his rights during the interrogation. Therefore, we are satisfied that the warnings reasonably apprised defendant of his right to consult with an attorney before being questioned.

4. Detective Zamora's Use of the Spanish Word "Apuntado" in Advising Defendant of His Right to Have Counsel Appointed if He Could Not Afford an Attorney

Defendant next contends that Detective Zamora's *Miranda* advisement was defective because Detective Zamora used the Spanish word "apuntado" to convey defendant's right to appointed counsel. We disagree.

During defendant's interrogation, Detective Zamora read defendant his *Miranda* rights in Spanish. To communicate to defendant that, if he could not afford a lawyer, one will be *appointed* to represent him, Detective Zamora used the Spanish word "apuntado." In the transcript prepared for the prosecution, the word "apuntado" was translated as "put down." Therefore, defendant contends that because Detective Zamora failed to convey defendant's right to an attorney both before and during questioning, the subsequent

warning that conveyed an attorney would be "put down" for him, did not reasonably convey his right to appointed counsel prior to questioning.

Detective Zamora testified at the hearing on the motion to suppress. Detective Zamora testified he is fluent in Spanish. He was born in Mexico, and was educated in Mexico and the United States. At the time of his testimony, Detective Zamora was certified to teach Spanish as a substitute teacher. He also receives "additional pay" as a detective for speaking Spanish and English. Detective Zamora testified that apuntado is properly translated to English as "appointed."

Defendant called a Spanish language court interpreter to testify as to the meaning of apuntado. The interpreter translated Detective Zamora's warning as: "If you cannot pay an attorney, one shall be jotted down . . . to represent to you with no cost." Defendant also called Carlota Caballero, a Riverside County Public Defender investigator, to testify as to the meaning of "apuntado." Caballero testified that she is fluent in both Spanish and English, and her position requires her to interview witnesses and clients in both languages. As to the dictionary meaning of "apuntar,"[6] Caballero testified that the word means "to jot down, to write down, to put down in writing." She also testified that a slang meaning of "apuntar" could mean appointed, "but it's not the correct word."

In response to defense counsel's request for a "factual finding" on the issue, the court responded: "I went more with the officer's [Detective Zamora's] translation than

[6] "Apuntado" is the past tense of "apuntar."

the interpreter. I didn't completely understand the interpreter and I noticed there was actually some words there that I recognized that he didn't even read. So I'm going with the officer's—the fact that he was born in Mexico and that he—his primary language is Spanish and the defendant's from Mexico. So I—factually, I liked the officer's translation."

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Here, the trial court took into consideration the conflicting testimony before it and found that Detective Zamora's use of the Spanish word "apuntado" adequately translated the English word "appoint" for defendant. Based on Detective Zamora's testimony, as well as the Riverside County Public Defender investigator's testimony as to a slang meaning of apuntado, we hold that there is substantial evidence to support the trial court's determination.

In addition, regardless of whether Detective Zamora's use of the Spanish word "apuntado" meant appoint or jot down, his communication was, in the context of the entire *Miranda* advisement, sufficient to reasonably convey to defendant his right to appointed counsel both before and during questioning. We therefore reject defendant's arguments concerning the adequacy of the *Miranda* advisements.

5. Voluntariness of Defendant's Confession

Defendant contends that incriminating statements he made to Detective Zamora regarding touching M. were coerced by Detective Zamora's improper promises of rewards or leniency. After considering the totality of the circumstances, we disagree.

During the interrogation, defendant initially denied touching M. Detective Zamora explained to defendant that he did not like to be offended. He continued: "[W]hen somebody offends me [it] is because they're lying to me." Defendant responded: "But I'm not lying." Thereafter, Detective Zamora stated: "[T]here's a way out for everything except for death,"[7] and "[e]verything has a solution. Okay. All I want to know is the truth." Defendant repeated that he touched A.'s vagina with his tongue, however, he continued to deny touching M., stating: "I give you my word."

As the questioning continued, defendant told Detective Zamora about one evening in which he slept in the same bed as his wife and M. While M. was sleeping he "[o]nly unbuttoned [M.'s] pants and zipper nothing more and that's it" because she moved once he touched her. Detective Zamora asked: "If [M.] hadn't moved you would've touched her?" Defendant responded: "Probably yes."

Detective Zamora continued to push defendant to "[p]ut everything on the table." Detective Zamora explained that when he used to work as a patrol officer he would issue a citation during a traffic stop if he was lied to. He added that, "if somebody would tell

[7] During the motion to suppress, Detective Zamora testified that the proper translation for the Spanish phrase is "[t]here is a way for everything," except for death.

me you know what I didn't put on the seatbelt because I forgot. Sorry I didn't have it on. I wouldn't give them a citation." Detective Zamora said he would tell the driver: "Please don't offend I'm not blind. I wasn't born yesterday. Don't offend me." Detective Zamora then told defendant: "And that's what I'm asking you today. Please I'm not blind I wasn't born yesterday. And I want to know what happened here." Detective Zamora then invited defendant to write a letter to A.'s parents. Defendant said he would ask them for forgiveness.

After completing the letter, defendant asked if he could use the restroom. Detective Zamora asked defendant if he could hold it. Defendant told Detective Zamora that he was able to hold it. Thereafter, Detective Zamora told defendant that he wanted to clarify his statement regarding touching M. Defendant stated that he only touched M.'s zipper. Detective Zamora stated: "Okay. But your hands touched her stomach or they touched her on . . .where did they touch her?" Defendant replied: "Her stomach."

On appeal, defendant contends Detective Zamora's statements, "there's a way out for everything except for death" and "[e]verything has a solution. Okay. All I want to know is the truth," amount to a promise of leniency, and that defendant's subsequent statements are therefore inadmissible. Further, defendant contends "[t]he traffic citation story was a parable for conveying the unambiguous message that [Detective] Zamora had the authority to grant . . . leniency."

The prosecution bears the burden of proving by a preponderance of the evidence that a defendant's confession was voluntarily made. (*People v. Markham* (1989) 49

Cal.3d 63, 71.) A confession is generally deemed voluntary if the accused "freely . . . chooses to speak without 'any form of compulsion or promise of reward. . . .'" (*People v. Tully* (2012) 54 Cal.4th 952, 985.) A showing of coercive police activity is necessary to find a confession was not made voluntarily; however, it is not dispositive. (*People v. Maury* (2003) 30 Cal.4th 342, 404.) Rather, a court must determine whether, in the totality of the circumstances, "the accused's decision to speak [was] entirely self-motivated," and not the result of his or her will being overborne. (*People v. Thompson* (1980) 27 Cal.3d 303, 327-328, disapproved on another point in *People v. Rowland* (1992) 4 Cal.4th 238;; *People v. Williams* (2010) 49 Cal.4th 405, 436.) """"On appeal . . . the trial court's finding as to the voluntariness of the confession is subject to independent review."""" (*People v. Williams, supra,* at p. 436.) """"[T]he trial court's findings as to the circumstances surrounding the confession . . . are . . . subject to review for substantial evidence."""" (*People v. Jones* (1998) 17 Cal.4th 279, 296.)

"Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise [of leniency], does not, however, make a subsequent confession involuntary." (*People v. Boyde* (1988) 46 Cal.3d 212, 238.) "However, where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law." (*Ibid*.) "In assessing allegedly coercive police tactics, '[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they

tend to produce a statement that is both involuntary and unreliable.'" (*People v. Smith* (2007) 40 Cal.4th 483, 501.)

We first consider Detective Zamora's statements, "there's a way out for everything except for death" and "[e]verything has a solution. Okay. All I want to know is the truth." Defendant contends Detective Zamora's statements "reasonably can be interpreted as [Detective] Zamora's willingness to make a deal with [defendant] or to work with him to find a solution to his predicament, that is, a promise of leniency." We disagree.

The discussion between Detective Zamora and defendant focused on Detective Zamora trying to elicit the truth from defendant. Detective Zamora made it clear to defendant that he did not want to be lied to. After Detective Zamora stated that "[e]verything has a solution. Okay," he immediately stated: "All I want to know is the truth." Thereafter, defendant reiterated what he had confessed to Detective Zamora earlier in the conversation, that he sexually assaulted A. Defendant gave Detective Zamora his word that nothing occurred between him and M. Defendant explained that nothing occurred with M. because when he unbuttoned her pants and unzipped her zipper, she moved. After Detective Zamora asked if he would have touched M. had she not moved, defendant replied: "Probably yes."

Based on our review of the transcript of the recording, we believe defendant's admission of touching M. was "entirely self-motivated" and not the result of his will being overborne. The record indicates that defendant believed that because he did not

continue to touch M. after she moved, he did not sexually assault her. That is, defendant did not appear to believe he was making a confession. Therefore, Detective Zamora's statements were not "a motivating cause of [defendant's] decision to confess."

We next consider Detective Zamora's traffic citation story, taking into consideration the surrounding circumstances. Defendant contends Detective Zamora's story "was a parable conveying the unambiguous message that [Detective] Zamora had the authority to grant [defendant] leniency if [defendant] told him what [Detective] Zamora believed to be the truth." We agree that Detective Zamora's traffic citation story may motivate many people to admit to a traffic violation if faced with similar circumstances. We do not agree, however, that the traffic citation story was a "motivating cause of [defendant's] decision to confess" because the disparity between a traffic violation and sexually assaulting minors is so great that most people would not believe Detective Zamora was implying he would grant defendant leniency in return for the truth.

In *People v. Seaton* (1983) 146 Cal.App.3d 67, an officer reminded the defendant, prior to reading his *Miranda* rights, that he was on California Youth Authority (CYA) "'parole hold and that it would benefit in a way if [he] would talk . . . .'" (*People v. Seaton, supra,* at p. 73.) The defendant said he believed "'[t]hat if [he] didn't talk to [the officer] or if [he] was found not guilty of a crime, that [he] could [still] do six months to a year in CYA.'" (*Ibid.*) After reading the defendant his *Miranda* rights, the officer told the defendant that "the district attorney would make no deals unless all of the information

defendant claimed to have was first on the table." (*People v. Seaton, supra,* at p. 74.) The court stated that the officer's statements were not an implied threat that the defendant must confess in order to avoid jail time. (*Ibid.*) Nor was it an implied promise that the CYA would be more lenient if he told the truth. (*Ibid.*) The court reasoned that the officer's statements did not rise to a promise of leniency or implied threat because "the discussion was in the context of advising defendant to tell the truth." (*Ibid.*, fn. omitted.)

In *People v. McClary* (1977) 20 Cal.3d 218, overruled on another point in *People v. Cahill* (1993) 5 Cal.4th 478, 509 and 510, and footnote 17, police interrogated the defendant about her involvement in a murder. (*People v. McClary*, *supra*, at p. 222.) The defendant initially denied any knowledge of the murder. (*Id.* at p. 223.) The police continuously called the defendant a liar, and told the defendant she would be charged as a principal to murder and would face the death penalty if she refused to admit her true involvement in the murder. (*Id.* at pp. 223-224.) The state Supreme Court held that the defendant's subsequent confession was "involuntary, a product of improper police threats and inducements . . . ." (*Id.* at p. 227.) In addition to making a direct and "partially false" threat, the interrogating officers "strongly implied that if defendant changed her story and admitted mere 'knowledge' of the murder, she might be charged only as an accessory after the fact." (*Id.* at p. 229.)

In *People v. Brommel* (1961) 56 Cal.2d 629, overruled on another point in *People v. Cahill, supra,* 5 Cal.4th 478, 509 and 510, and footnote 17, the defendant was arrested on suspicion of murdering his infant daughter. (*People v. Brommel, supra,* at p. 631.)

During interrogation, the suspect denied the accusations. (*Id.* at p. 633.) A police officer told the suspect that he would write the word "liar" on the police report if he did not change his story. (*Ibid.*) The judge would then not believe the defendant because he will have been "branded as a liar." (*Ibid.*) Defendant thereafter confessed. (*Id.* at p. 634.) The California Supreme Court held that the confession was inadmissible because the police officer's conduct rose to the level of a threat and implied promise of leniency. (*Ibid.*)

Here, defendant contends Detective Zamora's traffic citation story was an unambiguous promise of leniency if he told the truth. However, similar to *Seaton*, the traffic citation story did not rise to an implied promise of leniency because the discussion was in the context of Detective Zamora advising defendant to tell the truth. *Brommel* and *McClary* are both distinguishable and constructive. Following the recitation of the traffic story, defendant was given time to write an apology letter to A.'s parents, thus giving him time to gather his thoughts. In *McClary*, the defendant was continuously called a liar and was warned that she may face the death penalty unless she "acknowledged" the murder. Here, by contrast, Detective Zamora told defendant he wanted to "clarify" a few things; he never threatened defendant with the possible punishment he may face, and defendant was not continuously called a liar. Further, unlike the interrogation in *Brommel*, Detective Zamora made it clear that he was only asking for the truth. Detective Zamora did not call defendant a liar, and never threatened to brand him a liar. Rather, defendant admitted to touching M. on her stomach after he was asked to "clarify" a few things.

Because the evidence indicates Detective Zamora's statements were not a motivating factor in defendant's admissions, we conclude his statements were voluntary.

B. *Admission of A.'s and M.'s RCAT Interviews*

On November 7, 2008, the day that A. was molested, RCAT conducted interviews of both A. and M. The interviews were conducted with the assistance of a Spanish language interpreter.

At trial, following the testimony of A. and M., the videotaped interviews were admitted into evidence pursuant to section 1360 and shown to the jury. Defendant objected to the admission of the entire RCAT interviews on the grounds of hearsay, lack of foundation, improper impeachment, the cumulative nature of the interviews, and undue prejudice under section 352. On appeal, he argues that the court erred in admitting the RCAT interviews under section 1360 and should have been excluded under section 352. We reject these arguments.

1. Factual Background: The RCAT Interviews and Trial Testimony

During M.'s RCAT interview, she stated that defendant touched her "private part." M. explained that she went to sleep with Guadalupe and defendant. M. woke up during the night and went to the restroom where she noticed her zipper was down. After returning to bed, M. could feel somebody touching the front of her private part with his finger. M. knew it was defendant touching her because "he was the only one right there with my aunt." However, M. did not see defendant touch her. M. started to cry and told

Guadalupe that she was scared, but did not explain why. M. and Guadalupe hugged each other and went back to sleep.

At trial, M. testified only to facts concerning her zipper going down. When asked whether anything touched her or whether "anyone [went] underneath [her] underwear," she answered, "[n]o." Thereafter, she was asked whether she remembered telling the interviewers that after her zipper was pulled down someone put their hand underneath her underwear. M. answered, "[n]o."

During A.'s RCAT interview, she indicated that defendant, whom she referred to as "tio," touched her on her body. The interviewer provided A. with a picture of a girl and asked her to circle with a green marker where defendant touched her. A. circled the girl's vagina and stated that defendant touched her with his tongue. The interviewer asked A. if defendant touched her with any other part of his body. A. made a gesture that indicated defendant touched her with his hand. The interviewer asked: "And what did his hand do to your pee pee?" A. responded, "[h]e put it inside," which made her "[s]ad." At trial, A. testified that defendant touched her with his tongue. When asked whether defendant touched her with his finger, she responded, "[n]o." At no time thereafter did either attorney confront A. with her prior inconsistent statement.

2. Analysis Regarding Section 1360

Section 1360 creates an exception to the hearsay rule in criminal prosecutions for a child's statements describing acts of child abuse or neglect, including statements describing sexual abuse. (§ 1360; *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1327.)

The statute provides, in pertinent part: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

"*(1) The statement is not otherwise admissible by statute or court rule.*

"*(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.*

"(3) The child either:

"(A) Testifies at the proceedings.

"(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child." (Italics Added.)

Defendant makes two contentions as to the admission of the RCAT interviews under section 1360. First, he argues that the interviews were admissible as impeachment and were thus "otherwise admissible by statute or court rule." Second, he submits that the court did not hold a hearing outside the presence of the jury for purposes of determining whether there were sufficient indicia of reliability for purposes of admitting the RCAT interviews into evidence.

"We review a trial court's admission of evidence under section 1360 for abuse of discretion." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.) However, "[i]f evidence is admissible under any theory, the grounds stated in the ruling admitting the evidence are immaterial." (*Thorp v. Dept. of Alcoholic Bev. Control* (1959) 175 Cal.App.2d 489, 491.) Thus, even if the evidence was not admissible *under section 1360*, we will not reverse the judgment if the evidence was admissible on other grounds. (Cf. *People v. Brown* (2004) 33 Cal.4th 892, 901.)

These principles reveal the self-defeating nature of defendant's first argument. If the evidence was "otherwise admissible by statute or court rule" (as defendant contends), then it was improper to admit the evidence *under section 1360*; but because it is otherwise admissible by statute or court rule, the evidence was necessarily admissible. Thus, the very reason defendant gives for precluding evidence under section 1360 compels the conclusion that the evidence is admissible (under some other statute or court rule). There could not possibly be any reversible error on this basis.

The flaw is illustrated in this case. We agree with defendant that much of M.'s RCAT interview was "otherwise admissible" as impeachment evidence and thus not admissible under section 1360. In the RCAT interview, M. testified that defendant unzipped her clothing and touched her person with his finger. At trial, she testified only that he unzipped her clothing and denied that he touched her underneath her underpants. She was confronted with the discrepancy and said that she did not remember telling the RCAT interviewers that he touched her underneath her underpants. As such, it was

appropriate to admit, as a prior inconsistent statement, those portions of the RCAT interview wherein she described the touching. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1008-1009.) The portions not admissible as prior inconsistent statements (and not admissible under any other statute or court rule) are properly admitted under section 1360 provided the remaining requirements of that statute are met.

As to A., the trial court properly relied on section 1360 for the admission of the RCAT interview. Although portions of the interview could have been admissible as a prior inconsistent statement if A. had been given an opportunity to explain the difference between her statements during the interview and her trial testimony, she was not so confronted. As such, the RCAT interview was not admissible as a prior inconsistent statement. (§ 770, subd. (a); see *People v. Alexander* (2010) 49 Cal.4th 846, 908-909 [witness must be given an opportunity to explain or deny the statement prior to impeachment].) No other statute or court rule is suggested by defendant as a basis for admitting the RCAT interview. Thus, because the RCAT interview was not otherwise admissible by statute or court rule, the trial court properly relied on section 1360 in admitting the evidence.[8]

Defendant's second argument is that the admission of the RCAT interviews was prohibited because the trial court did not make any express findings "'in a hearing

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[8] After the videotaped interview was admitted into evidence, it was played to the jury. Prior to playing the videotape for the jury, A. was recalled to the witness stand. After the playing of the interview was complete, A. did acknowledge that she remembered telling the RCAT interviewer what was in the videotape.

conducted outside the presence of the jury,'" as to "'the time, content, and circumstances of the statement[s].'" We disagree.

First, although the trial court must hold "a hearing conducted outside the presence of the jury" (§ 1360, subd. (a)(2)), section 1360 does not require the trial court to conduct a formal section 402 hearing with detailed testimony about the nature of and circumstances surrounding the interview process. Here, the court and counsel discussed the admissibility of the RCAT interviews at great length, outside the presence of the jury, over portions of two days. During the course of the discussions, the court was made aware of its responsibilities under section 1360 to consider the time, content, and circumstances of the statements to establish whether they met the indicia of reliability under section 1360. The requirement of a hearing outside the presence of the jury is easily met in this case.

Second, while the court must find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability" (§ 1360; see *People v. Brodit, supra,* 61 Cal.App.4th at pp. 1329-1330), there is no requirement that the court explicitly state such findings on the record. Generally, unless the Legislature has mandated that a trial court express its findings on the record, we must infer that the trial court made all findings necessary to support its ruling. (§ 402, subd. (c); *People v. Manning* (1973) 33 Cal.App.3d 586, 601-602.) Defendant provides no reason to depart from this rule of implied findings here.

We reject defendant's argument that there is no evidence to support the court's reliability finding. In defendant's statements to Detective Zamora, he corroborated much of what A. and M. told the RCAT interviewer. As to A., he admitted that he licked her vagina and may have touched her with his finger. As to M., he admitted unzipping and unbuttoning her pants, and touching her on her stomach. A.'s statements to the RCAT interviewer were consistent with what A.'s father saw when he entered the mobilehome. Both RCAT interviews occurred shortly after the respective incidents, while the facts were fresh in the mind of each victim. Further, the record reflects no motive for either of the victims to make up the facts they described to the interviewers. Finally, when their respective RCAT interview was played to the jury, both victims were on the witness stand and vouched for the accuracy of the information imparted during the interviews. There is therefore substantial evidence to support the court's reliability finding for purposes of section 1360.

3. Analysis Regarding Section 352

Defendant contends the admission of the videotapes of A.'s and M.'s entire RCAT interviews was an abuse of discretion under section 352. We disagree.

Under section 352, the trial court may exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) The trial court's discretion to exclude

evidence must be exercised reasonably, in light of the evidence before the court. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.)

Defendant submits that the RCAT interviews should not have been admitted because they were "'of such [a] nature as to inflame the emotions of the jury.'" In so arguing, defendant correctly notes that the evidence must be of such a nature so as to "motivat[e the jury] to . . . not . . . logically evaluate the point upon which [the evidence] is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)

Initially, we note that the RCAT interviews took place only two years prior to the time that the victims testified. At both the time of the interviews and at the time of their testimony they would be considered young girls. As such, we cannot find that the RCAT interviews depicted individuals any more vulnerable than they appeared at the time of trial. In both instances they described the events in relatively immature terms. And given the consistency of their testimony and the corroboration provided by the other witnesses, as well as defendant's statements, it is patent that the jury did not throw logic aside in reaching its verdicts.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.